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Nos. 85-999 and 85-1129

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

PHILLIP PARADISE, *et al.*,
Respondents.

PAUL E. JOHNSON,
Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Eleventh Circuits

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BRIEF OF CITY OF DETROIT, THE DISTRICT OF COLUMBIA AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
CONSENT OF THE PARTIES	1
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. EXPERIENCE SHOWS THAT MINORITY PARTICIPATION AT ALL LEVELS, ESPECIALLY SUPERVISORY LEVELS, IS VITAL TO EFFECTIVE PERFORMANCE BY PUBLIC SAFETY AGENCIES	5
A. Crippling Effects of the Exclusion of Blacks From Positions of Responsible Supervision	5
B. Detroit's Race-Conscious Efforts Beginning in 1974	7
C. The Fruits of Detroit's Efforts	9
D. The Experience of Other Cities	13
II. THE DESIRE TO CORRECT THE CRIPPLING EFFECTS OF DISCRIMINATION ON PERFORMANCE OF PUBLIC SAFETY FUNCTIONS WAS A LEADING CONCERN OF CONGRESS IN EXTENDING TITLE VII COVERAGE TO STATE AND LOCAL GOVERNMENTS	16
III. THERE IS NO BARRIER UNDER TITLE VII OR THE CONSTITUTION AGAINST USE OF RACE-CONSCIOUS MEASURES IN CONNECTION WITH PROMOTIONS	20
CONCLUSION	24

TABLE OF AUTHORITIES

Cases Page

Baker v. City of Detroit, 483 F.Supp. 930 (E.D. Mich. 1979) ..... *passim*
Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980) 3
Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (1984) 2, 9, 23
Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) .. 14
Detroit Police Officers Association v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), *on remand*, 36 FEP Cases 1019 (E.D. Mich. 1984), *appeal pending* (6th Cir. 85-1120) 2, 14, 15
Dougherty v. Barry, 607 F.Supp. 1271 (D.D.C. 1985), *appeals pending* (D.C. Cir. Nos. 85-5715/5716) 3
Hammon v. Barry, 606 F.Supp. 1082 (D.D.C. 1985), *appeals pending*, Nos. 85-5669/5670/5671 (D.C. Cir.) 3
NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. 1194 (E.D. Mich. 1984) 8, 12
Tablert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982) 14
Wygant v. Jackson Board of Education, —— U.S. ——, 106 S.Ct. 1842 (1986) 12, 20-23
United Steelworkers v. Weber, 443 U.S. 193 (1979) 16, 21-23

Constitutional Provisions, Statutes and Regulations

U.S. Constitution, 14th Amendment 4, 20
Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.*
Title VII, 42 U.S.C. § 2000e, *et seq.* 4, 16
Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167, 1206 (1979)
§ 815(b)(1) 16

TABLE OF AUTHORITIES—Continued

Page

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; Pub. L. No. 91-644, 84 Stat. 1881; 42 U.S.C. § 3789d 15
28 C.F.R. § 42.203(i)(1) (1985) 15
28 C.F.R. § 42.203(i)(2) (1985) 15
28 C.F.R. § 42.203(j) (1985) 16
28 C.F.R. § 42.301 (1985) 15

Legislative History

Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92 Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* (Comm. Print 1972) 18, 19

Other Authorities

National Advisory Commission on Civil Disorders, *Report* (1968) 13
National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973) 13
National Commission on the Causes and Prevention of Violence, *Final Report: To Establish Justice, To Insure Domestic Tranquility* (1969) 13
National Commission on Law Observance and Enforcement, *Report on the Causes of Crime* (1931) 13
President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967) 13, 15
U.S. Commission on Civil Rights, *Confronting Racial Isolation in Miami* (1982) 14
U.S. Commission on Civil Rights, *For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment* (1969) 17
U.S. Commission on Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest* (1970) 17
U.S. Commission on Civil Rights, *Who Is Guarding the Guardians: A Report on Police Practices* (1981) 14

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BRIEF OF CITY OF DETROIT, THE DISTRICT OF COLUMBIA AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

CONSENT OF THE PARTIES

Consent to the filing of this Brief is excused by Rule 36.4 of the Rules of this Court.

INTEREST OF AMICI

The City of Detroit has suffered adverse consequences because of prior discriminatory practices of its public safety agencies, particularly its Department of Police,

and a failure to correct the effects of this discrimination. For the past twelve years Detroit has implemented affirmative action plans which have gone far to eradicate the effects of past discrimination against minorities and to cure the crippling effects of that discrimination upon its public safety agencies.[1]

Detroit's affirmative action efforts have been focused on promotions. The district court in *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), found, after a lengthy trial, that Detroit's steps to increase black representation at all levels of the Police Department had played a vital role in reducing citizen distrust of the police, developing community cooperation with the Department, improving the Department's ability to function, and reducing crime. *Baker, supra*, 483 F.Supp. at 997-1000. Detroit has pursued these programs unilaterally and voluntarily. However, for Detroit and many other public employers, the authority of the judiciary to decree race-conscious measures in the event unlawful discrimination were established through litigation has provided a vital catalyst for voluntary remedial action.

The District of Columbia has similarly suffered the consequences of prior discriminatory practices by its public safety agencies. Presently pending is a challenge to voluntary race-conscious measures governing hiring in its Fire Department which were sustained by the district

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[1] Detroit's race-conscious program governing promotions in its Police Department has thus far withstood two separate challenges brought on behalf of white police officers under the Equal Protection clause and federal civil rights laws. *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), *on remand*, 36 FEP Cases 1019 (E.D. Mich. 1984), *appeal pending* (6th Cir. No. 85-1120) (sustaining race-conscious promotions to the rank of sergeant); *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (1984) (sustaining race-conscious promotions to the rank of lieutenant).

court as appropriately "designed to break down an old pattern of racial segregation and hierarchy." *Hammon v. Barry*, 606 F.Supp. 1082, 1090 (D.D.C. 1985), *appeals pending*, Nos. 85-5669/5670/5671 (D.C. Cir.). Also pending is a challenge to race-conscious promotions undertaken by the District to undo the consequences of past racial segregation and exclusion of blacks at the highest levels of the Department. *Dougherty v. Barry*, 607 F. Supp. 1271 (D.D.C. 1985), *appeals pending* (D.C. Cir. Nos. 85-5715/5716).

The City of Los Angeles has addressed from a different perspective the historical underrepresentation of racial minorities and women in its public safety agencies. Without admitting any liability, the City of Los Angeles joined the United States Justice Department and a certified class of women police applicants in recommending entry of three consent decrees establishing goals and timetables for the hiring of racial minorities in the Los Angeles City Fire Department (1974) and for the hiring of racial minorities and women in the Los Angeles Police Department (1980).

Faced with strong statistical showings of underrepresentation in both departments, and a Court of Appeals ruling that police height and physical ability requirements produced disparate impact against women applicants without business necessity, *Blake v. City of Los Angeles*, 595 F.2d 1367, 1375-76 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980), the City elected to resolve this complex litigation. Also without admitting past discrimination, Los Angeles has unilaterally employed sex-conscious hiring measures to correct historical underrepresentation of women in the Fire Department and has otherwise pursued affirmative action in various municipal employment contexts.

The Los Angeles consent decrees were based largely upon the affirmative action goals and timetables contained within them. If the use of these goals and timetables cannot lawfully occur, costly litigation will re-

open, a decade of growth in racial understanding in the two departments will be threatened, and the establishment of sworn services representative of the communities they serve will be delayed.

SUMMARY OF ARGUMENT

Numerous studies by prestigious, national commissions have recognized the crippling effects of unlawful discrimination upon state and local governments, particularly on the operations of police and other public safety agencies. In extending Title VII in 1972 to cover state and local governments, Congress took note of the findings of such studies. A major legislative objective was to free governmental functions of the crippling effects of discrimination in such vital areas as public safety, education, and the administration of justice.

Last Term, the United States pressed a *per se* challenge to race-conscious affirmative action in any aspect of employment whether public or private and whether imposed by a Court or voluntarily initiated. The United States' *per se* challenge was decisively rejected. The United States now presses another, albeit narrower, *per se* challenge to affirmative action. It contends that, *regardless* of the inefficacy of other measures, affirmative, race-conscious measures are impermissible *whenever such measures occur in the context of promotions.* It is often the case that the crippling effects of past discrimination are most severely felt in the supervisory ranks of municipal employers. Further, it is often the case that use of race-conscious measures is most necessary, and urgently so, in the context of promotions to such positions. Acceptance of the United States' position would strip the federal courts and also public employers of an essential tool for overcoming patterns of racial exclusion.

Neither Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, nor the Fourteenth Amendment of the United States Constitution requires such a result.

ARGUMENT

I. EXPERIENCE SHOWS THAT MINORITY PARTICIPATION AT ALL LEVELS, ESPECIALLY SUPERVISORY LEVELS, IS VITAL TO EFFECTIVE PERFORMANCE BY PUBLIC SAFETY AGENCIES.

A. Crippling Effects of the Exclusion of Blacks From Positions of Responsible Supervision.

A *per se* rule that Title VII prohibits race-conscious remedial measures in the context of promotions would stifle efforts to end the mistrust and antagonisms that have developed in our cities between law enforcement agencies and minority citizens. Mutual alienation, with crippling effects on law enforcement and other vital public functions, has resulted in substantial part from long-standing policies and practices of exclusion of minorities from employment in law enforcement agencies. Such crippling effects are often most severely felt in the supervisory ranks of public safety agencies where, absent race-conscious measures, a paucity of minority representation may persist for many years after discrimination has ceased. An end to hiring discrimination and the undertaking even of vigorous minority *hiring* efforts will not by themselves begin to fulfill the urgent need for more minorities in higher ranks. The experience of the City of Detroit is particularly instructive in this regard.

Detroit has suffered, and federal court records document, *see Baker, supra*, 483 F.Supp. at 996-97, racially-based police-community tensions caused in substantial part by years of neglect in the recruitment, hiring and advancement of black public safety officers. Major riots in 1943 and 1967, as well as several other less noted civil disturbances before and after 1967, were just some of the many manifestations of the breakdown of police community relations. Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year. Moreover, the widespread belief in Detroit's black com-

munity that the police lacked interest in investigating black-on-black crime—to a large extent, a function of the absence of blacks at supervisory and policy levels of the Department—resulted in a loss of essential citizen cooperation in the police department's crime fighting efforts. *Id.* As described by the District Court in *Baker*:

> [T]he Police Department was regarded as an 'occupation army' in the black community and was treated as such . . . . Officers were afraid to venture into the [black] community for fear of being harassed or worse.
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> The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe.
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> • • • •
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> Chief Hart testified that '[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; it's a matter of record.'
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> • • • •
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> The black community's response to Department practices was deep hatred and alienation. Not only did the community hate the police, it had no confidence in the police's interest in investigating or solving black on black crime. This lack of confidence was justifiable. The result was that the police got no cooperation from the black community in solving crime.
>
> This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police Chief Hart, and former Chiefs Tannian and Murphy. So substantial was the community's aliena-

> tion that at times there was active interference with officers performing their duty.
>
> • • • •
>
> The police themselves—and ultimately the citizens of Detroit—were the real victims of discriminatory practices.

Id.

The persistence of police practices which poisoned relationships with the black community was attributable *less* to the underepresentation of blacks at the officer rank, substantial though it was, than to *the virtual absence of blacks in positions with the authority to curb such practices.* Until substantial numbers of black personnel appeared in supervisory and command positions, black residents of Detroit remained unpersuaded that the Department had stopped regarding them as "second class citizens" and black officers continued to feel they were regarded as "second class employees".

The willingness of Detroit to recognize and act on the destructive consequences of failure to correct the extreme underutilization of black officers, particularly at higher levels of the Department, came painfully. The riots in 1967 jolted the City of Detroit into a realization that something would have to be done to correct these imbalances. *See id.* at 946. Between 1967 and 1973 some efforts were not successful. *Id.* at 947-52. In the interim the City's public safety agencies continued to be hampered by effects of their discriminatory legacy. *Id.* at 996-99.

B. Detroit's Race-Conscious Efforts Beginning in 1974.

Finally, in 1974, the City adopted a program of affirmative action employment measures. *Id.* at 963-64. The Department's need for more blacks at the entry-level rank of Officer was satisfied, without a race-conscious goal and implementing ratio, by: (1) eliminating practices with an adverse impact on black applicants for hire;

(2) introducing a rule requiring residency in Detroit as a condition for making application; and (3) minority-focused recruiting.[2] For promotions, different steps were needed. Candidates for promotion to sergeant and lieutenant came from the existing ranks of officers and sergeants which would for many years—regardless of the efficacy of minority hiring efforts—continue to reflect the effects of longstanding and persistent discrimination in hiring to, and promotion from, the entry rank of officer. Meanwhile, the Department faced an urgent need for more black personnel as sergeants and lieutenants. A program of race-conscious promotions was adopted by the City's Board of Police Commissioners consistent with the Detroit City Charter and after public hearings at which the Chief of Police and other concerned persons presented views both for and against such a program. *Baker*, *supra*, at 964.

Under the program adopted, the Department departs from making promotions in strict rank order from the eligibility lists, and promotes instead at an approximate

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[2] As of June 1974 when Detroit commenced those efforts, the Department was 17.2% black overall but only 5.15% of the sergeants and 4.78% of the lieutenants were black. *Id.* at 963. At that time, the population of Detroit was approximately 50% black. As a result of minority hiring efforts, the Department at the end of 1978 had attained black representation overall of 34.6% and at the officer rank, 39.1%.

In 1979 and 1980, a fiscal crisis necessitated layoffs of 1,100 officers. Through application of inverse seniority, the layoffs reduced black representation to 26% overall and 28% at the officer rank. *NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194, 1197 (E.D. Mich. 1984), *appeals pending*, Nos. 84-1836, 85-1026, 85-1027, and 85-1041 (6th Cir.). The bulk of those officers remained on layoff until called back in 1984 and 1985 as a result of the District Court's July 25, 1984 Order, 591 F.Supp. at 1220-1221 as revised November 7, 1984, 36 FEP Cases 434, 439 (E.D. Mich. 1984). The recall of the laid off officers and extensive additional hiring made possible by improved economic conditions have brought black representation at the officer rank to the present level of 48%.

50-50 black-white ratio. Operation of the Detroit plan is not rigid but rather depends upon the availability of qualified black applicants and consistent review by the Chief of Police and the Board of Police Commissioners. In order to be eligible for promotion, black officers have had to demonstrate their qualifications by passing the regular promotional examination. After a thorough review of the evidence, the District Court in *Baker* found that black officers promoted under the affirmative action plan were "substantially equally qualified" as the white officers who were promoted in rank order. *Baker, supra,* at 970-79. The Sixth Circuit recognized that "*only well-qualified* blacks were promoted." *Bratton, supra,* 704 F.2d at 892 (Emphasis in original). Furthermore, in public meetings the Board of Police Commissioners has regularly reviewed the affirmative action promotions proposed by the Chief of Police, *Baker, supra,* at 924-27. Service ratings of Detroit's police sergeants and lieutenants indicate that those promoted pursuant to the plan have performed as well as those promoted in rank order.

In 1979, at the direction of the District Court to establish a "terminating period", *Baker, supra,* at 1003, the Board of Police Commissioners determined that the program of race-conscious promotions would continue until black representation at the sergeant and lieutenant ranks reached 50%. See *Baker v. City of Detroit,* 504 F.Supp. 841, 845-846 (E.D. Mich. 1980). Detroit has continued to apply the promotional ratio since 1974 in pursuit of the 50% end goal. Black representation has reached 32% at the rank of sergeant and 34% at the rank of lieutenant.

C. The Fruits of Detroit's Efforts.

Detroit's affirmative action efforts have resulted in dramatic improvements in the ability of the Detroit Police Department to deliver effective police service. Perhaps the most stark evidence of the effectiveness of

Detroit's affirmative action plan was the reduction in the number of officers killed in the line of duty. Prior to 1974, six to eight police officers were killed each year; from 1974 until 1982, no officers lost their lives in the line of duty.[3] *See id.* at 1000. In *Baker*, the district court detailed this and other improvements and concluded:

> There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints against the Department went down, and no police officers were killed in the line of duty. High ranking police officials attributed this change to the affirmative action program and its general aim of having the Department—at all levels—reflect the City's population.

Id.

Detroit's experience specifically indicates that visible representation of minorities at all levels of the police department, not merely at the patrol level, is of critical importance in breaking the pattern of hostility and alienation that results from prior exclusion of minorities. As stated by the district court:

> The testimony at trial demonstrates that it is important to have blacks at all levels. The importance of black lieutenants in reducing discriminatory practices cannot be overstated. It is very difficult to mistreat blacks if one knows that the commanding officer is black. Inspector Douglas emphasized that the presence of a black lieutenant at police raids ensured that blacks on the scene would not be abused.

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[3] Although Detroit has since suffered the death of smaller numbers of police officers, the police department's relationship with the black community continues to improve.

Similarly, a black lieutenant affects the perceptions of the black community. He is a commanding officer whose very presence confirms that blacks are no longer the second-class policemen which they used to be. Chief Hart put it this way:

> 'When [citizens] arrive at the precinct stations, they see some black lieutenants sitting behind the desk making decisions on their lives and they feel better about that. They will cooperate with us. They don't feel that we are an army of occupation.'
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> Two other examples were mentioned at trial. Inspector Mack Douglas commented upon the leadership of black lieutenants in handling crowds and demonstrators. He testified concerning an incident where a white officer had gotten into an altercation with a black woman whom he had stopped for a traffic offense. A hostile crowd of 40-50 blacks had gathered and a cry of 'officer in trouble' was put out over the radio. Then-lieutenant Douglas, who is black, rushed to the potentially-explosive scene. He was able to calm the crowd, assure them he would personally look into the incident, and persuade them to disperse.
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> Chief Hart testified concerning a barricaded gunman situation. When dealing with this crisis situation, the police have to handle both the gunman and the crowds which inevitably develop. In the past, the crowds were often hostile to white officers. With a black lieutenant in control, the crowds were not a problem.

Id. at 998-99. In the experience of Detroit, the ability to make race-conscious employment decisions has been the critical ingredient in efforts to restore community trust in Detroit's law enforcement agencies and to facilitate Detroit's ability to protect the lives and property of its people. *See id.* at 999.

The importance of race-conscious promotions was highlighted especially during the period from 1980 through mid-1985 when large numbers of officers were laid off and black representation at the officer rank was sharply reduced. The District Court in *NAACP v. DPOA*, *supra*, described unrebutted testimony by Detroit's police officials that "community relations with the police force had dramatically improved since 1974" "as the result of the increase in black representation on the police force . . . ." 591 F.Supp. at 1206. The Court credited testimony that, notwithstanding the effect of the layoffs, there remained "a residue of good will in the community resulting from the increased black representation on the force." *Id.* While observing that this "good will" is "not inexhaustible", the District Court in *NAACP* credited its endurance over a period of several years in part to "*the presence of many black command officers, who were unaffected by the layoffs. . . .*" *Id.* (Emphasis added).

Use of race-conscious measures in promotions has been the centerpiece of Detroit's affirmative action efforts. Consistent with the concerns stated in *Weber* and in Justice Powell's opinion in *Wygant v. Jackson Board of Education*, —— U.S. ——, 106 S.Ct. 1842, 1851-1852 (1986), Detroit has refrained from use of race-conscious measures in layoffs.[4] In Detroit's experience, the increased presence of black personnel in positions of responsible supervision has proved to be of critical importance in carrying forward critical improvements in citizen cooperation during a several-year period when black representation at the officer level was severely reduced.

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[4] In the *NAACP* case, the district court determined that Detroit's failure to preserve the 1978 level of black representation through use of race-conscious measures was in violation of the Constitution. Detroits' appeal from that determination is pending in the Sixth Circuit.

D. The Experience of Other Cities.

Overwhelming evidence of the experience in many other cities demonstrates that the crisis experienced by Detroit is only one example of a nationwide problem. The Sixth Circuit has collected and summarized the many studies that make the importance of having racially representative police forces in our cities judicially noticeable. The operational need to have a minority presence in public safety agencies that is representative of the minority population of the community served

> is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, *Final Report: To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. See *To Establish Justice, supra* at 145; *Report on Civil Disorders, supra* at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders, supra* at 301; *Task Force Report: The Police, supra* at 144-45, 167; *Police, supra* at 330.
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> These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the 'Wickersham Commission.' *Report on the Causes of Crime* 242, National Commission on Law Observance and Enforcement (Vol. I, 1931).

In 1967, a presidential commission stated the proposition offered by the defendants in this case:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.

Task Force Report: The Police, supra at 167.

Detroit Police Officers Ass'n v. Young, 608 F.2d at 695.[5]

More recently completed studies have reached the same conclusion. In a report published in October 1981, the United States Commission on Civil Rights found: "Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence." U.S. Commission on Civil Rights, *Who Is Guarding the Guardians: A Report on Police Practices*, 5 (1981). Following an investigation into the May 1980 racial disturbance in Miami, Florida, the U.S. Civil Rights Commission observed: "In Dade County, an essentially white system administers justice to a defendant and victim population that is largely black. The lack of minorities throughout the criminal justice system maintains the perception of a dual system of justice." U.S. Commission on Civil Rights, *Confronting Racial Isolation In Miami*, 290 (1982).

These studies confirm Detroit's experience that minority representation at the higher levels of law enforcement also is crucial. A 1967 Report of the President's

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[5] Other courts of appeals have agreed with the Sixth Circuit concerning the operational need for a racially representative police force. *See Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

Commission on Law Enforcement and Administration of Justice, entitled *Task Force Report: The Police*, concluded that: "[i]f minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policymaking and other crucial decisions." *Id.* at 172. Relying on this and other studies, the Sixth Circuit concluded that the need for a police department representative of the community as a whole "extends to the higher ranks in police departments." *Detroit Police Officers Ass'n v. Young*, 608 F.2d at 695.

The federal government also has recognized the public safety crisis created by discrimination against minorities by state and local law enforcement agencies and has called for affirmative action to remedy this problem. The Law Enforcement Assistance Administration (LEAA)[6] has concluded "that the full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States." 28 C.F.R. § 42.301 (1985). LEAA regulations require that where a "recipient has previously discriminated against persons on the ground of race . . . [or] color . . ., the recipient must take affirmative action to overcome the effects of prior discrimination." 28 C.F.R. § 42.203(i)(1) (1985).[7]

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[6] The LEAA is the arm of the Department of Justice which administers federal financial assistance to state and local law enforcement agencies and which enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, Pub. L. No. 90-351, 82 Stat. 197; Pub. L. No. 91-644, 84 Stat. 1881; 42 U.S.C. § 3789d.

[7] The regulations also provide that, "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race . . . [or] color . . . ." 28 C.F.R. § 42.203(i)(2) (1985). Although there are statutory provisions stating that the LEAA may

This Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), upheld the voluntary use of affirmative, race-conscious measures under Title VII as an appropriate means of removing racial barriers and opening employment opportunity. Acceptance of Petitioners' *per se* challenge to the decreeing of such measures would not only strip the courts of an essential remedial tool but would eliminate a vital catalyst to the voluntary affirmative action held salutary in *Weber*. Such a result would go far to defeat the purpose of Congress in 1972 of extending Title VII to state and local governments.

II. THE DESIRE TO CORRECT THE CRIPPLING EFFECTS OF DISCRIMINATION ON PERFORMANCE OF PUBLIC SAFETY FUNCTIONS WAS A LEADING CONCERN OF CONGRESS IN EXTENDING TITLE VII COVERAGE TO STATE AND LOCAL GOVERNMENTS.

In extending Title VII to cover state and local governments, Congress recognized that governmental ability to carry out vital functions in the areas of public safety, education and administration of justice was crippled in many instances by a legacy of discrimination. Congress contemplated that remedies would be devised which would effectively overcome patterns of racial exclusion and thereby remove impediments to government's ability to function. Affirmative remedies "mirror" Congress' objective. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

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not require a recipient to adopt "a percentage ratio, quota system, or other program to achieve racial balance," 42 U.S.C. § 3789d(b), the regulations promulgated thereunder recognize that "[t]he use of goals and timetables is not use of a quota prohibited by this section." 28 C.F.R. § 42.203(j) (1985). Notably, the statute in its original form prohibited remedies intended "to achieve racial balance or *to eliminate racial imbalance*." 42 U.S.C. § 3766 (1976) (emphasis added). This last restriction was deleted by Section 815(b)(1) of the Justice System Improvement Act of 1979, Pub. L. No. 96-147, 93 Stat. 1167, 1206 (1979).

Subsequent to the enactment of Title VII in 1964, widespread community unrest including riots in numerous cities and other localities provoked a heightened concern regarding the quality of race relations in this country. As set forth above, a succession of national commissions drew attention to the low representation of minority groups in policing and other public safety functions as a cause of the disorders.

Congress in 1972 subscribed explicitly to the concerns expressed in these reports. In extending Title VII coverage to state and local governments, Congress looked for guidance specifically to two such reports by the U.S. Commission on Civil Rights: (1) *For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment* (1969), and (2) *Mexican Americans and the Administration of Justice in the Southwest* (1970). These two Commission reports were quoted in both the Senate and House Committee reports; referred to in debate by the sponsor of the legislation; and set forth in full in the Congressional Record.

Congress took notice of the crippling effects of racial exclusions from public employment on the ability to govern. It identified the need to remedy this condition as one of the central purposes of extending Title VII to cover state and local governments. The Report of the Senate Committee on Labor and Public Welfare, citing the reports of the U.S. Commission on Civil Rights, stated:

> This failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. . . . Discrimination by government therefore serves a doubly destructive

> purpose. *The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government.*" S.Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971), *reprinted in 1972 Leg. Hist.* at 419 (emphasis added).[8]

The Report of the House of Representatives Committee, also citing the Civil Rights Commission reports, was to the same effect:

> The problem of employment discrimination is particularly acute *and has the most deleterious effect in these governmental activities which are most visible to the minority communities* (notably education, law enforcement, and the administration of justice) *with the result that the credibility of the government's claim to represent all the people is negated.* H.R. Rep. No. 92-238, 92d Cong., 1st Sess 17 (1971), *1972 Leg. Hist.* at 77 (emphasis added).

Senator Harrison Williams, chairman of the Labor and Public Welfare Committee and sponsor of S.2515, emphasized strongly the Congressional concern for the ability of units of state and local government to carry out their assigned responsibilities. He stated that the Committee had acted out of a belief that their work was "essential to the viability of State and local governmental units." *1972 Leg. Hist.* at 1116. He stated that the Senate Committee's concern with employment discrimination was based, in large part, upon the unfavorable impact which it had on "the ability of . . . governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment." *Id.* As Senator Williams succinctly phrased the matter,

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[8] References to *1972 Leg. Hist.* are to *Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, (Comm. Print 1972).

"If they are to carry out their jobs with any success whatever, public confidence in their impartiality is vital." *Id.* (emphasis added).

In the course of Senate debate, Senator Williams referred to and placed in the Congressional Record, both Reports of the U.S. Commission on Civil Rights. *1972 Leg. Hist.* at 1117, *et seq.* With respect to race-conscious remedies, the 1969 Report stated:

> [W]henever in public employment discriminatorily created patterns persist, the Constitution requires that they be remedied *by measures aimed at giving the work force the shape it presently would have were it not for such past discrimination.* It should be recognized that such measures are not a 'preference' but rather a restoration of equality; one can see inequity in such remedies only by being blind to the past injustices which they cure.

1972 Leg. Hist. at 1120 (emphasis added). The Commission's 1969 Report called for state and local governments to adopt programs which will "bring about whatever changes in minority utilization are necessary to undo the effects of past discrimination." *1972 Leg. Hist.* at 1120. *"Where patterns of minority utilization are to be changed, the program should include specific goals, or estimates, to be achieved within a specified period of time."* *Id.* (emphasis added).

Congressional solicitude for assuring the ability of local governmental units to carry out their essential functions is in harmony with court decisions such as *Baker* upholding Detroit's use of race-conscious measures in its police department. It matches precisely the experience of *amici* in pursuing race-conscious affirmative measures to increase minority representation in their public safety departments. To date, those measures have gone far toward undoing the debilitating effects of discrimination which influenced Congress to extend Title VII to cover state and local governments.

III. THERE IS NO BARRIER UNDER TITLE VII OR THE CONSTITUTION AGAINST USE OF RACE-CONSCIOUS MEASURES IN CONNECTION WITH PROMOTIONS.

This Court's prior decisions involving affirmative action have produced a considerable degree of consensus. All of the Justices have determined that if there is a *sound basis for concluding* that a public employer has engaged in prior discrimination then the public employer may take race-conscious remedial affirmative action. The United States last Term contended that a governmental employer may not, in any circumstance, implement a race-conscious affirmative action plan which provides a benefit to an individual without first proving that the individual was a victim of racial discrimination. The Supreme Court unequivocally rejected that position. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concluded in *Wygant v. Jackson Board of Education*, *supra*, 106 S.Ct. at 1850, "that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." Justice O'Connor summarized:

> The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

Wygant, *supra*, 106 S.Ct. at 1853 (O'Connor, J.)

In the course of his *Wygant* plurality opinion, Justice Powell spoke in broad terms regarding use of race-

conscious measures, respectively, in hiring and in layoff. Justice Powell observed that "[i]n cases involving valid *hiring* goals" the burden on innocent individuals is largely "diffused among society generally" and that denial of hire is less "intrusive" than "loss of an existing job." 106 S.Ct. at 1851. Justice Powell proceeded to focus on the unique burden on innocent individuals arising from race-conscious layoffs:

> Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. . . . Layoffs disrupt these settled expectations in a way that general hiring goals do not.
>
> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. *Id.* at 1851-1852.

Based on this discussion, the Petitioners present a simplistic contention for a *per se* rule against race-conscious measures for promotions: as in the case of layoffs, the burden of a race-conscious promotion is said to be borne by the particular individuals who are passed over for promotion rather than diffused among society generally. Brief of United States in *Paradise*, ——; Brief of Petitioners in *Johnson*, 32-42. This argument—lumping promotions together with layoffs in supposed joint contrast to hiring—is contrary to *Weber*. *Weber* itself involved, not a hiring program whose burden was diffused among society generally, but an in-plant training program. Selection to that program, which carried with it advancement to craft status, was a matter of *promotion*, not *initial hire*. The non-selection of Mr. Weber for that program defeated his own individual seniority expectation every bit as much as a race-conscious layoff would

defeat the individual seniority expectation of employees laid off thereby. Nevertheless, the Supreme Court contrasted the *race-conscious promotion* involved in *Weber* with a measure causing *loss of employment* by an innocent individual. It was on this basis that the Court in *Weber* held that the plan at issue there *did not trammel* the interests of nonminorities and accordingly *was not too intrusive*. Criitcal to the Court in *Weber* was the fact that the plan did not create an "absolute bar" to advancement of white employees inasmuch as half of those trained in the program would be white. Thus, in *Weber* itself, the Court's concern with excessive burden upon nonminority employees was focused upon (1) removal of white workers from the work force, and (2) absolute bars to advancement.

It is plain that race-conscious measures in promotions *do not* impose the same sorts of burdens as layoffs. They do not remove any individual from the work force. Nor would any properly-drawn promotional measure constitute an "absolute bar"—or even an undue bar—on the advancement of nonminorities.[9]

Promotions also present a far different case than layoffs from the standpoint of the existence of less intrusive means. Justice Powell observed

> Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

Wygant, supra, 106 S.Ct. at 1852. In *Wygant*, the "valid purpose" was increasing the representation of minorities

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[9] Since the inception of race-conscious promotional measures in Detroit, several hundred white officers have been promoted to the ranks of sergeant and lieutenant. Detroit's program is hardly a bar on advancement by nonminorities.

as teachers in a particular school system; in Justice Powell's view, that purpose could be satisfactorily advanced through race-conscious hiring without provision for preferential layoffs. *Cf.* Opinion of Marshall, J. dissenting, 106 S.Ct. at 1865-1866. The notion of race-conscious hiring as a "less intrusive means" would obviously have had no application in a setting such as *Weber* or in other cases where increasing minority representation in positions beyond the entry level is itself the "valid purpose". In *Weber*, the Court recognized the exclusion of minorities from craft employment. *Weber, supra*, 443 U.S. at 198, n.1. Given the unavailability of minority skilled craftsmen in the exterior labor market, merely setting a goal for *hiring* minority craftsmen would obviously have been ineffectual as a means for increasing minority representation in Kaiser's craft workforce.

Use of a race-conscious promotional measure by Kaiser and the United Steelworkers *was the least intrusive means* just as it was in Detroit. A hiring goal would have failed, for many years to come, to satisfy Detroit's urgent need for more blacks in positions of responsible supervision. As stated by the Sixth Circuit

> [T]he use of racial classifications reflects the only legitimate method for achieving [the] objectives [of the plan] in light of the urgent need for a remedy and the practical limitations placed on the effective use of other means . . . .

Bratton v. City of Detroit, 704 F.2d at 892. See also *Baker, supra*, 483 F. Supp. at 994 ("the affirmative action program was necessary to ensure the rapid eradication of past discriminatory effects . . . *nothing less than race-conscious promotions could do this.*") (emphasis added).

CONCLUSION

This Court should decisively reject the contention that race-conscious measures are prohibited when they involve promotions either by the Constitution or by Title VII.

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